No. 90-97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN HOSPITAL ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF ST. MARGARET MEMORIAL HOSPITAL AND McKEESPORT HOSPITAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JOHN E. LYNCHESKI*
MICHAEL J. REILLY
E. DONALD LADOV
RONALD J. ANDRYKOVITCH
JEFFREY A. VAN DOREN

COHEN & GRIGSBY, P.C.
2900 CNG Tower
625 Liberty Avenue
Pittsburgh, Pennsylvania 15222
(412) 394-4900

Counsel for St. Margaret Memorial Hospital and McKeesport Hospital, Amici Curiae

**Counsel of Record*

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following entities and individuals were appellants in the court of appeals and are respondents in this Court:

James M. Stephens
Mary M. Cracraft
Dennis M. Devaney
Clifford R. Oviatt, Jr.*
John C. Truesdale
American Nurses Association
American Federation of Labor and Congress of Industrial Organization
Building and Construction Trades Department, AFL-CIO

*Substituted as a respondent pursuant to Rule 35.3 of the Rules of this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 90-97

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OCTOBER TERM, 1990

AMERICAN HOSPITAL ASSOCIATION,
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NATIONAL LABOR RELATIONS BOARD, et. al.,
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BRIEF OF ST. MARGARET MEMORIAL HOSPITAL AND MCKEESPORT HOSPITAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

St. Margaret Memorial Hospital ("St. Margaret") and McKeesport Hospital ("McKeesport") submit this joint brief as *amici curiae* in support of Petitioner, American Hospital Association ("AHA"). Both McKeesport and St. Margaret are

"acute care hospitals" as defined in Respondent National Labor Relations Board's (the "Board" or "NLRB") Final Rule for Collective-Bargaining Units in the Health Care Industry (the "Final Rule"), 54 Fed. Reg. 16347-16348 (1989); 29 C.F.R. §103.30. McKeesport and St. Margaret, along with all other acute care hospitals, will be directly affected by the Board's Final Rule which was upheld by the United States Court of Appeals for the Seventh Circuit. The AHA has petitioned this Court for a writ of certiorari to review the Seventh Circuit's decision.

St. Margaret Memorial Hospital. St. Margaret is a 287 bed hospital located in Pittsburgh, Pennsylvania which employs approximately 1,300 regular full and part-time employees. Although none of the employees at St. Margaret are represented by a labor organization, a

petition was filed with Region Six of the NLRB on April 27, 1990 by International Union of Operating Engineers, Local 95-95A, AFL-CIO (the "Operating Engineers") by which it seeks to represent a unit limited to 17 maintenance employees.[1/] That petition is being held in abeyance by the NLRB pending the Court's decision in this case.[2/]

The Operating Engineers assert that the petitioned-for unit of maintenance employees is appropriate in that it is a "skilled maintenance" unit, one of the eight specific bargaining units now determined to be "appropriate" by the Board in its Final Rule. 29 C.F.R. §103.30(a)(5).

The Seventh Circuit's decision upholding the NLRB's Final Rule, insofar as the Rule deems a separate collective

1/ NLRB Case No. 6-RC-10447.

2/ See NLRB General Counsel Memorandum, 89-7 (May 30, 1989).

bargaining unit for skilled maintenance employees to be an appropriate unit, is squarely at odds with well established law in the United States Court of Appeals for the Third Circuit, where St. Margaret is situated.[3/]

Certiorari should be granted to resolve the clear split of authority in the Circuits with respect to the appropriateness of a separate unit of skilled maintenance employees.[4/] Failure to grant certiorari will result in St. Margaret, and numerous other similarly situated non-profit hospitals, having to pursue needless, costly and time-consuming proceedings and appeals through the NLRB to the Third Circuit and ultimately again before this Court.

3/ *Allegheny General Hospital v. NLRB*, 608 F.2d 965 (3d Cir. 1979); *St. Vincent's Hospital v. NLRB*, 567 F.2d 588 (3d Cir. 1977).

4/ The Second Circuit Court of Appeals shares the Third Circuit's view on the inappropriateness of such units. *NLRB v. Mercy Hospital Association*, 606 F.2d 22 (2d Cir. 1979), *cert. denied*, 445 U.S. 971 (1980).

McKeesport Hospital. McKeesport Hospital, located in McKeesport, Pennsylvania, employs 1,552 regular full and part-time employees to care for the needs of patients in its 420 licensed beds. A significant number of the employees at McKeesport are represented for collective bargaining. Nurses (both registered and licensed) are represented in a single unit by the General Staff Nurses Association of McKeesport Hospital, Service Employees International Union, Local 585, AFL-CIO ("Local 585"); skilled maintenance employees are represented by Operating Engineers, Local 95-95A; and the Hospital's service employees are represented by Service Personnel & Employees of the Dairy Industry, Teamsters Local Union No. 205 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the "Teamsters").

McKeesport's physicians, other professional employees, technical employees, clerical employees, other nonprofessional employees and security guards, are not presently represented.

The recent history of McKeesport is a case study of the disruptive effects of the work stoppages, whipsawing and leapfrogging which Congress feared would be created by the proliferation of health care bargaining units. While the NLRB said that it found little evidence that multiple units have resulted in strikes, jurisdictional disputes and whipsawing, McKeesport's experience in only three bargaining units contradicts this finding and illustrates the disastrous impact that proliferation of bargaining units will have on the future of labor relations in this and other acute care hospitals if the eight unit Final Rule is implemented.

In a period of less than six months in early 1988, McKeesport faced the disruptive effects of the expiration and renegotiation of three labor contracts, three very real threats of economic strike, union organizing campaigns culminating in two NLRB elections and an unexpected, illegal strike by 250 Teamster-represented service employees -- all accompanied by numerous arbitration, agency, NLRB and Court proceedings. Not fully recovered, McKeesport and its patients suffered a three week Nurses' strike in early 1990.

Because of the potential economic and operational impact that the Board's Final Rule has on St. Margaret, McKeesport and other acute care hospitals, and the disruption that will occur if the validity of the NLRB's Final Rule is not finally determined, we submit this brief in support of the AHA's

Petition and urge the Court to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The Final Rule is contrary to Section 9(b) of the National Labor Relations Act (the "Act or "NLRA") and Congress' 1974 admonition against proliferation of bargaining units in health care institutions. The NLRB Final Rule will exacerbate the extant burden of health care costs against Congress also admonished in 1974.

SUMMARY OF ARGUMENT

The cases of St. Margaret and McKeesport convincingly illustrate the adverse effects that the Court's failure to grant the AHA's Petition will have on the health care industry. While this brief deals with the situations of only two of the more than 5,000 hospitals potentially affected by the Final Rule, a

similar impact on many other institutions is imminent. Moreover, the concerns which caused the authors of the 1974 Health Care Amendments to the NLRA, Pub. L. No. 93-360, 88 Stat. 395, to recognize the need to afford hospitals special protection to minimize the adverse effects of work stoppages and other disruptions to safe patient care have now taken on new proportions. The cost of healthcare has continued to skyrocket, threatening to make proper care unaffordable for many Americans. It has never been more important than the present to protect the public interest by affording hospitals the safeguards which Congress envisioned to be necessary when it admonished the Board to 'avoid undue proliferation of bargaining units in hospitals.

The legislative history of the 1974 Health Care Amendments, by which Congress expanded the NLRB's jurisdiction to cover

not-for-profit hospitals, makes clear that Congress considered proliferation of units a danger to patient care and feared that it would lead to increased costs for medical care. To address these concerns, the Congressional committees responsible for the legislation very purposefully included language in their committee reports directing that:

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry.

S. Rep. No. 93-766, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News, pp. 3946, 3950; H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 6-7 (1974).

Senator Taft, one of the primary sponsors of the legislation, explained the rationale for this "Congressional admonition":

> I believe this is a sound approach and a constructive compromise, as the Board should be

> permitted some flexibility in unit determination cases. I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented.
>
> . . . .
>
> In analyzing the issue of bargaining units, the Board should also consider the issue of the cost of medical care. Undue unit proliferation must not be permitted to create wage "leapfrogging" and "whipsawing." The cost of medical care in this country has already skyrocketed, and costs must be maintained at a reasonable level to permit adequate health care for Americans from all economic sectors.
>
> The committee in recognizing these issues with regard to bargaining unit determination, took a significant step forward in establishing the factor of public interest to be considered by the Board in unit cases.

120 Cong. Rec. 12944-45 (1974)

While paying only "lip service" to Congress' admonition against unit proliferation by saying it was "entitled to our respectful consideration", *American*

Hospital Association v. NLRB, 899 F.2d 651, 658 (7th Cir. 1990), the Seventh Circuit concluded that the Board's Final Rule did not constitute undue proliferation in conflict with Congress' intention when it passed the 1974 Health Care Amendments. St. Margaret and McKeesport agree with the AHA that the Seventh Circuit's conclusion is in conflict with decisions of the Courts of Appeals for the Ninth and Tenth Circuits. Moreover, St. Margaret and McKeesport believe the Seventh Circuit's decision is also at odds with decisions of the Court of Appeals for the Third Circuit and has created a clear and irreconcilable split in the courts of appeals insofar as the decision upholds the validity of a separate maintenance employee unit. Finally, McKeesport's experience colorfully illustrates that the Court of Appeals' decision is also flawed inasmuch

as it sanctions the Board's erroneous conclusion that the work stoppages, whipsawing and leapfrogging feared by Congress when it extended the Act to cover non-profit hospitals, has not occurred in hospitals with multiple bargaining units.

A. The Court Of Appeals' Decision Affirming The Validity Of The NLRB's Final Rule Creates A Clear Split In The Circuits Insofar As The Rule Provides That A Separate Unit Of Skilled Maintenance Employees Is Appropriate.

In its Final Rule, the NLRB reversed the position that it took in its first Notice of Proposed Rulemaking ("NPR I"), 52 Fed. Reg. 25142 (1987), and in many of its earlier decisions,[5/] and determined that a separate unit of skilled maintenance employees is now appropriate. While the Board has also approved

[5/] *See, e.g., Shriners Hospital*, 217 NLRB 806 (1975); *Jewish Hospital Association*, 223 NLRB 614 (1976); and *Peter Bent Brigham Hospital*, 231 NLRB 929 (1977).

separate units of maintenance employees in other cases, the Board's attempts to certify such units on a case-by-case basis have not once met with approval by the courts of appeals.[6/] In spite of this fact, the NLRB, with the approval of the Seventh Circuit, now seeks to mandate through rule-making what it was unable to obtain through adjudication.

The Third Circuit has twice examined and rejected separate units of hospital maintenance employees. In *St. Vincent's Hospital v. NLRB*, *supra*, the issue before the Third Circuit was the NLRB's certification of a separate unit consisting primarily of boiler room employees. In refusing to enforce the NLRB's certification of the unit, the Third Circuit exhaustively reviewed the

6/ *See, e.g., Mercy Hospital Association*, 238 NLRB 1018 (1978), *enforcement denied* 606 F.2d 22 (2d Cir. 1979), *cert. denied* 445 U.S. 791 (1980); *Allegheny General Hospital*, 239 NLRB 872 (1978), *enforcement denied* 608 F.2d 965 (3d Cir. 1979); *St. Vincent's Hospital*, 223 NLRB 614 (1978), *enforcement denied* 567 F.2d 588 (3d Cir. 1977).

legislative history of the 1974 Amendments and, in consideration of Congress' admonition against proliferation, stated:

> [t]he legislative history of the health care amendments, however, makes it quite clear that Congress directed the Board to apply a standard that was not traditional. Proliferation of units in industrial settings has not been the subject of congressional attention but fragmentation in the health care field has aroused legislative apprehension. The Board therefore should recognize that the contours of a bargaining unit in other industries do not follow the blueprint Congress desired in a hospital.

567 F.2d at 592. The Third Circuit proceeded to explain that the Board's use of its traditional factors for determining unit appropriateness in hospitals violated the Congressional admonition against undue proliferation. The court added:

> [T]he factors of amount of contact between workers, separate immediate supervision, and the special skills of certain crafts

> must be put in balance against the public interest in preventing fragmentation in the health care field. A mechanical reliance on traditional patterns based on licensing, supervision, skills and employee joint activity simply does not comply with congressional intent to treat this unique field in a special manner.

Id. (emphasis added.) The Court thus refused to enforce the Board's order directing St. Vincent to bargain with the separately certified unit.[7/]

The NLRB, however, later disagreed with the Third Circuit's analysis in *St. Vincent's* and certified a separate unit of maintenance employees in *Allegheny General Hospital*. The Board discussed

7/ The Third Circuit in *St. Vincent's* noted its reliance on the Board's earlier decisions in *Shriners Hospital and Jewish Hospital Association* to be the correct expressions of the law properly recognizing the considerations to be applied by the Board. In *Shriners*, the Board said: "... mindful of the congressional mandate and in the exercise of our discretion, we find that in the health care industry the only appropriate unit for collective bargaining which encompasses stationary engineers is a broad unit consisting of all service and maintenance employees of the employer, excluding professionals and business office clericals. 217 NLRB at 808 (emphasis added).

the Court's holding in *St. Vincent*:

> In *St. Vincent's Hospital v. NLRB*, the court decided that the legislative history of the 1974 amendments to the Act, specifically the statement in the accompanying Senate and House committee reports that '[d]ue consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry,' and the explanations of it offered by certain sponsors of the amendments, precluded the Board from finding appropriate separate units of maintenance and powerhouse employees at health care institutions ... . After carefully reconsidering the legislative history of the 1974 amendments, we have concluded that, with all due respect to the court, Congress did not intend to prohibit such units.

239 NLRB at 872 (footnotes omitted).

The Third Circuit, in *Allegheny General Hospital v. NLRB*, refused to enforce the Board's order. The Court stressed that the case presented "a most unusual circumstance in which a federal agency has refused to apply the law announced by the federal judiciary." 608 F.2d at 968. Refusing to reappraise its

St. Vincent's decision, the Third Circuit emphasized that the NLRB had neither the power nor authority to disagree with the decisions of the court, then instructed the Board concerning the fundamental doctrines of *stare decisis* and the power of the federal judiciary to interpret statutes. The Third Circuit emphatically concluded that "for the Board to predicate an order on its disagreement with this court's interpretation of a statute is for it to operate outside the law." 608 F.2d at 970 (emphasis added).

By adopting its Final Rule, the Board is now attempting to achieve through rule-making precisely what the Third Circuit and other courts of appeals have held that it may not achieve through adjudication. Citing the refusal of the courts to approve such units, the NLRB did not propose a separate unit of skilled maintenance employees to be

appropriate in NPR I. But, the Board reversed its position in its Second Notice of Proposed Rulemaking ("NPR II") 53 Fed. Reg. 33900, 33920 (1988), and concluded that skilled maintenance employees "can and should constitute a separate appropriate bargaining unit." To reach this conclusion, however, the NLRB did exactly what the Third Circuit instructed it not to do in health care cases, that is to mechanically rely upon traditional community-of-interest factors in formulating its rule, without considering the effects of unit fragmentation or the special public interest in hospital unit determination. *Allegheny General v. NLRB*, 608 F.2d at 971.

The conflict between the decisions of the Third Circuit and the Seventh Circuit with respect to a separate skilled maintenance unit could not be more apparent. The Third Circuit clearly

held in *St. Vincent's*, and reaffirmed in *Allegheny General*, that the NLRB's reliance on traditional community-of-interest factors "simply does not comply with the Congressional intent to treat this unique field in a special manner." *St. Vincent's v. NLRB*, 567 F.2d at 592. The Seventh Circuit's decision does not even address the question of whether the Congressional admonition against the proliferation of bargaining units in hospitals requires more than the Final Rule's apparent reliance upon traditional community of interest criteria.

Quite clearly, the NLRB's Final Rule as approved by the Seventh Circuit disregards the decisions of the Third Circuit and its interpretation of the Board's governing statute, notwithstanding the court's chastisement of the Board in *Allegheny General*. Consequently, if faced with this question again,

the Third Circuit will almost certainly conclude that the Board is operating "outside the law" in its attempt to mandate by Rule a separate unit of skilled maintenance employees.

In the St. Margaret case, the Operating Engineers have petitioned the NLRB for an election in a skilled maintenance unit limited to 17 of the hospital's approximately 1300 employees. Under the Final Rule, upheld by the Seventh Circuit, such a unit would be appropriate. In light of the clear Third Circuit precedent, which holds that a separate skilled maintenance unit is not appropriate, St. Margaret is in the untenable position of having to acquiesce to a unit determination which the Third Circuit has held to be unlawful and contrary to Congress' admonition against proliferation, or to go through the expense and uncertainty of challenging

the NLRB's Rule by refusing to bargain, and seek review in the Third Circuit.

Unfortunately, adjudication by the Third Circuit would not be immediate nor would it be without considerable time and expense on the part of St. Margaret and other hospitals similarly affected. If this Court were to deny the extant Petition for a Writ of Certiorari and allow the Final Rule to take effect, the NLRB Regional office would immediately resume processing the pending representation case now held in abeyance.

Since the Board would find the skilled maintenance unit appropriate under its Final Rule, the result would certainly be a Decision and Direction of Election by the NLRB Regional Director. Although the Hospital would procedurally be required to Request Review by the NLRB of the Regional Director's determination, the Request would be denied, again

because of the Rule, and an election would be conducted. The Board's unit determination in a representation proceeding pursuant to Section 9(b) of the Act and the denial of a Request for Review are not directly reviewable by the courts of appeals. *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940).

In order to reach the court of appeals for review, it would be necessary for St. Margaret to "test the certification" by refusing to bargain with the Operating Engineers, thereby deliberately committing an unfair labor practice, forcing the NLRB to issue an appealable bargaining order against the Hospital. The proceedings attendant with investigation of the unfair labor practice charge, the issuance of and response to a formal Complaint and Notice of Hearing before an Administrative Law Judge, and an appeal to the Board, would take several months

to more than a year and would be very costly for the Hospital.

Only after the NLRB rules on the case may the Hospital bring a Petition for Review by the Third Circuit and/or may the NLRB petition the court for Enforcement. Again, the time frame for petitioning and obtaining a decision by the Court of Appeals may take several additional months to a year or more.

During the two to three years during all the described obligatory legal proceedings, both the Operating Engineers and St. Margaret will be required to expend tremendous amounts of money, effort and time advocating and protecting their respective positions. A side effect of this process is that during the pendency of the unfair labor practice charges, employers oftentimes act at their own peril by making changes in wages, hours or working conditions

without bargaining with the union. The risk, in the event that the certification is determined to be valid, is that the employer may be required to rescind all such changes. Back pay liabilities may accrue. Since employers are very reluctant to make changes under these circumstances, such restraints are very disruptive of employee morale, productivity and, in a hospital, a distraction from patient care. Finally, and significantly, the Union would be free at any time to protest the hospital's refusal to bargain by striking St. Margaret. The expenses attendant with a hospital's exercise of its rights to have its "day in court," particularly in the Third Circuit where there exists a high probability the hospital will prevail, add to the cost of providing its health care and, in a different vein, again runs afoul of Congress' concerns.

Significantly, the St. Margaret case is only one of three cases involving skilled maintenance units presently filed and pending in Region Six of the NLRB in Pittsburgh, Pennsylvania. The Operating Engineers have also filed petitions seeking to represent skilled maintenance units at Central Medical Center and Shadyside Hospital, both located in Pittsburgh.[8/] There is a clear potential for many more such petitions to be filed, resulting in additional costly, time consuming and disruptive appeals to the Third Circuit.[9/]

8/ NLRB Case Nos. 6-RC-10445 and 6-RC-10446.

9/ The law firm of Cohen & Grigsby represents approximately 35 acute care hospitals within the jurisdiction of the Third Circuit Court of Appeals and is aware of several other organizing campaigns for hospital skilled maintenance units by the Operating Engineers. Many of those campaigns will result in additional NLRB representation petitions limited to skilled maintenance units as soon as the injunction/stay preventing the NLRB from implementing its Final Rule is lifted. We have reason to expect in excess of ten, and possibly more, petitions to be filed shortly after the Rule is permitted to go

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The Court can prevent the disruptive effects of such case-by-case challenges of the Board's Final Rule by granting the Petition for a Writ of Certiorari in this case and by resolving the clear conflict between the Circuits.

B. Proliferation Of Bargaining Units Leads To The Types Of Problems Congress Feared When It Passed The 1974 Health Care Amendments.

Congress' concern about proliferation of bargaining units in hospitals was based upon a fear that proliferation would lead to numerous work stoppages, jurisdictional disputes, and wage and benefit whipsawing and leapfrogging, which, in turn, would add to the already skyrocketing costs of medical care. *See* p. 8-10, *supra*. The Board, in NPR II, examined the "evidence" presented in

Footnote continued from previous page.

into effect. Each hospital so petitioned must individually pursue the costly and circuitous route through the NLRB to the Circuit to preserve its rights and remedies.

connection with its rule-making procedure and concluded that there was "little if any evidence that multiple units in the health care industry have resulted in any of the problems perceived to arise from proliferation." 53 Fed. Reg. at 33908. As the AHA points out, however, "the Board's 'finding' ignores the fact that there has not been a proliferation of bargaining units in the industry since 1974 because the courts have rejected the Board's approach."[10/] AHA Petition at 22. The Seventh Circuit's sanctioning of the NLRB's clear disagreement with Congress and the courts over the effects of unit proliferation in itself warrants review by this Court.

10/ By the Board's own admission, its evidence showed that only about 10% of organized hospitals negotiate three or more contracts. 53 Fed.Reg. at 33908. For the Board to conclude on the basis of that record that eight units are appropriate and that such proliferation will not lead to the problems feared by Congress is, as the AHA notes, "sheer speculation." AHA Petition at 22.

McKeesport is an example of a hospital that has experience negotiating and administering contracts with multiple bargaining units. Although the three bargaining units at McKeesport are several fewer than the eight permitted by the Final Rule, McKeesport's experience in dealing with multiple units is indicative of the problems hospitals will face when multiple units are certified by the NLRB. McKeesport's labor history graphically illustrates the future of hospital bargaining if the Final Rule is permitted to stand. Contrary to the NLRB's "finding" in NPR II,[11/] McKeesport's experience has been that multiple units have resulted in multiple work stoppages and threats of work stoppages, wage and benefit whipsawing and leapfrog-

11/ The Board does not discuss the effects of proliferation in its Final Rule other than to note that it had thoroughly considered such arguments in NPR I and NPR II and that no further consideration or response was required. 54 Fed. Reg. at 16337.

ging, multiple contract negotiations, labor arbitrations and other matters which cause significant disr ptions to patient care and contribute to escalating health care costs. In short, McKeesport's recent history proves that the concerns expressed by Congress as it passed the 1974 Health Care Amendments remain valid, and in McKeesport's case, have come to fruition.

As mentioned above, McKeesport has three units of represented employees. It has the potential for five, or even six, additional units under the NLRB Final Rule. Contracts for all three of McKeesport's units were due to expire in the first half of 1988. In December 1987, Teamsters Local 205, which already represented the Hospital's service employees, petitioned the NLRB for an election in a unit of technical and clerical employees. An election was

scheduled for February 19, 1988. SEIU Local 585 and Office and Professional Employees International Union, Local 457, AFL-CIO, also secured places on the ballot and became involved in the organizing campaign.

During the election campaign, in what is widely-believed to have been a show of strength intended to influence the election and "whipsaw" the Hospital, the service employees represented by the Teamsters walked off their jobs, without giving the Hospital notice as required by Section 8(g) of the Act, 29 U.S.C. §158(g).[12/] In fact, the Teamster walkout

[12/] In NPR II, the Board suggested that hospitals seek common expiration dates to solve problems caused by recurring near-strikes including multiple §8(g) strike notices. 53 Fed.Reg. at 33909. Not only is such a suggestion incredibly naive, ignoring as it does the realities of hospital bargaining, but McKeesport's experience has shown that contemporaneous expiration dates actually exacerbate problems rather than solve them. Unions have recognized the bargaining leverage separate expiration dates provide. It is thus highly unlikely that a self-respecting union

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came without any warning. It was also in derogation of a no-strike clause in the labor agreement.[13/] When the employees refused to return to work, McKeesport had no choice but to replace employees participating in the illegal walkout.

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would simply give away this leverage in order to serve the public interest of forestalling problems caused by recurring near strikes. Even assuming that a hospital could negotiate common expiration dates, that would not assure that all of its unions would give simultaneous §8(g) strike notices. The timing of such notices is entirely within the discretion of the union. If a union was inclined to work beyond the contract expiration date, it could simply delay giving its §8(g) notice and unions acting in concert could "whipsaw" the hospital to death through sequential and multiple notices of an impending strike. The hospital would then be forced either to allow the employees to work under the expired contract or to lock them out and cause a disruption of its operations. Following the Board's suggested approach would virtually require a hospital to close down and lay off non-striking employees every time the multiple contracts were set to expire. Planning to operate a hospital under the simultaneous threat of multiple work stoppages would be virtually impossible.

13/ This was not the first time that the Teamsters had staged an illegal walkout. On at least one prior occasion in 1986, the Union engaged in the same tactic. The Union had also threatened, on numerous occasions, to walk out in support of its grievances.

As could be expected, the illegal walkout and McKeesport's reaction triggered a flurry of legal actions. McKeesport filed unfair labor practice charges against the Union for violation of Sections 8(g) and 8(b)(1)(A) of the Act, 29 U.S.C. §§158(g), 158(b)(1)(A), and brought suit in federal court seeking, *inter alia*, damages under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185. The Teamsters, for its part, also filed unfair labor practice charges and grieved the Hospital's decisions to terminate and replace its members. After the parties disputed the arbitrability of the grievances, the Union brought suit in federal court to compel arbitration.[14/]

Contemporaneous with the illegal Teamsters strike, negotiations had begun

14/ All of these various suits, unfair labor practice charges and other legal proceedings were settled by the parties approximately three months after the illegal strike.

with SEIU Local 585 for the nurses' unit. Local 585 was involved in the NLRB election campaign for the technical/ clerical unit and obviously sought to use the negotiations to bolster its chances of victory in the election.[15/] In this charged environment, the nurses came to the bargaining table disgruntled about perceived wage inequities and fringe benefit disparities in the expiring contract. At the bargaining table, Local 585 sought to make up for these perceived disparities and demanded substantial increases. As negotiations continued, Local 585 informed the hospital that it would strike on March 22, 1988.

In response to Local 585's Section 8(g) strike notice, McKeesport had no choice but to take the steps that any

15/ The first election in the proposed technical/clerical unit was held on February 19, 1988. No union received a majority vote. The NLRB then scheduled a run-off between the Teamsters and "No Union" on March 17, 1988. At the March 17 run-off election, the employees voted to remain unrepresented.

prudent hospital must take to protect the well being of patients when faced with a Section 8(g) strike notice. Thus, McKeesport began to curtail admissions, canceled elective surgeries and began preparations to transfer patients to other institutions. McKeesport also began to implement plans to lay-off other employees and to consolidate operations by closing several hospital units. Fortunately for McKeesport's patients and the community, the Hospital and Local 585 reached agreement on the eve of contract expiration, thereby averting a strike.[16/]

The agreement with Local 585 provided for significant economic increases. Because of Local 585's leverage, and in the context of the

16/ Contrary to the NLRB's assumptions, Section 8(g) has been somewhat of a mixed blessing. While it undoubtedly protects hospitals and their patients when a strike does occur, it places a burden upon hospitals and their patient community in the many more cases where the contract is settled short of a strike, almost always at the eleventh hour after the 8(g) notice and the hospital's prudent preparatory response.

ongoing Teamster troubles, the Hospital was pressured to accede to many Union demands since a nurse's strike most assuredly would have closed the Hospital for the duration of the strike, and quite possibly could have forced permanent reductions in the Hospital's operations due to the concurrent lingering effects of the Teamsters' walkout.

Shortly after narrowly averting a strike by the nurses, McKeesport was again involved in difficult contract negotiations -- this time with Teamsters Local 205.[17/] These negotiations were conducted in the very charged environment following the Teamsters' election defeat and the many legal and other disputes between the Teamsters and the Hospital occasioned by the illegal walkout.

[17/] The Teamster agreement expired May 1 and the negotiations actually had begun before March 22 while the Nurses' negotiations were still in progress.

Just two months later, the Hospital faced the expiration of the Operating Engineers contract who also demanded a hefty increase, leveraging off the effects of the labor disputes with SEIU and the Teamsters. Once again, the Hospital was compelled to seek to maintain labor peace and recognize the Operating Engineers' leverage. After the illegal Teamsters' walkout and the near strike by the nurses, McKeesport could not risk further negative effects from another work stoppage or the attendant legal costs if it had to face a strike by its maintenance workers, who, while small in number, occupied positions critical to continued operation of the Hospital.

Before McKeesport had fully recovered from the 1988 labor problems occasioned and exacerbated by the multiple units, the Hospital was faced with a new, serious threat. The nurses'

contract with Local 585, negotiated in 1988, expired in the spring of 1990. Unlike 1988, however, the parties were unable to reach agreement in time to prevent a strike. The work stoppage lasted from March 1 until March 17, 1990. The impact on patient care and other hospital operations was dramatic. Once again, the hospital had to implement its strike contingency plans even before the strike began. Admissions were curtailed, non-essential surgery was cancelled, and patients, some seriously ill, were transferred by ambulance to other institutions. The hospital had to "staff-down" because of the strike and in the process laid off hundreds of service, maintenance, technical, and clerical employees.

The lay-offs and subsequent recall of these employees engendered further labor disputes. Numerous employees grieved either their initial lay-off or

circumstances relating to their recall. At present, there are over 50 such grievances awaiting arbitration. Other side effects of the lay-offs include severely dampened employee morale and heightened tensions between the various units of Hospital employees. McKeesport expects that these and other problems resulting from the nurses' strike may continue well into the future.

McKeesport's 1988 labor problems from its multiple units and the experience with the 1990 nurses' strike resoundingly affirm the validity of Congress' concerns upon passage of the 1974 Health Care Amendments. With the Teamsters, Operating Engineers and Local 585 contracts all expiring within the same general time period, each union used the other unions' threats, demands and bargaining gains as leverage to gain agreement for its own bargaining propos-

als. Further, we submit, both the Teamsters and Local 585 undoubtedly used the negotiations to attempt to influence the NLRB election in the technical/ clerical unit.

Finally, the nurses' strike caused disruptions not only in patient care but in the Hospital's relationship with its other Unions. The end result of these activities by multiple units was precisely the kind of whipsawing, leap-frogging and work stoppages that Congress feared when it passed the Health Care Amendments. Despite these experiences, which undoubtedly are or will be repeated at other hospitals with multiple units, the NLRB found little "evidence" that Congress' concerns were valid. That conclusion is flawed.

The time, effort and expense associated with negotiating and administering contracts with multiple units has

dramatically increased non-patient care related operating costs at McKeesport.[18/] Such costs will certainly increase exponentially if the NLRB's eight unit Final Rule is permitted to stand, all at a time when Congress and the public have become increasingly alarmed about rising health care costs.

Increases in medical costs resulting from unit proliferation was clearly a primary concern of Congress in 1974 as it passed the Health Care Amendments. Senator Taft very specifically warned that "the cost of medical care in this

18/ For example, in its Final Rule, the Board itself cites evidence revealing that negotiation of a single collective bargaining agreement can cost between $15-40,000 in legal fees alone. 59 Fed.Reg. at 16339. Other costs for negotiations which are also very significant include staff time devoted to actual bargaining, costs associated with surveying local wage rates in other institutions, drafting and costing contract proposals and counter-proposals, studying the potential impact of proposals on operations and clerical duties related to the preparation of draft proposals, bargaining notes and final proposals. Unless some economics could be achieved, these costs potentially would be multiplied eight times if the Board's Final Rule is permitted to stand.

country ha[d] already skyrocketed, and costs must be maintained at a reasonable level to permit adequate health care for Americans from all economic sectors."[19/] Congress' concern applies with even more urgency in today's economy. Thus, it is imperative that the NLRB pay heed to Congress' admonition and recognize this important public interest in preventing unit proliferation.[20/]

19/ As the legislative history shows, this was a primary concern that caused Congress to issue its express mandate against undue proliferation. 120 Cong. Rec. 12944-45 (1974). See *supra* pp. 9-10.

20/ Many acute-care hospitals today receive a majority of their funding from federal Medicare and similar state Medical Assistance programs. At McKeesport, for example, about 68% of all admissions are paid for by Medicare or the Pennsylvania Medical Assistance Program. Other Southwestern Pennsylvania hospitals compare at approximately 67%. *Hospital Costs Rise 17.4%, Pittsburgh Post-Gazette*, Aug. 14, 1990 at 6 Col. 2. As a result, public funds budgeted for these critical programs, which would otherwise be used in direct patient care activities, will, by necessity, be used to cover increased operating costs resulting from strikes, multiple negotiations, whipsawing and leapfrogging. The public interest is not served by diverting public funds from critical health care programs to cover non-

Footnote continued on next page.

The NLRB in its rulemaking did not consider the public interest in affordable health care as a factor militating against unit proliferation. Rather, in its Final Rule the Board concluded:

> The statutory amendments enacted by Congress in 1974 represented an <u>implicit</u> policy decision that collective bargaining in the health care industry will produce countervailing benefits justifying the cost.

54 Fed. Reg. 16339. (emphasis added.) The Board simply brushed aside Congress' <u>express</u> policy decision that unit proliferation should be prevented because of its negative impact on health care costs. By upholding the Board's Final Rule, the Seventh Circuit has sanctioned the Board's clear departure from Congress' intent.

Footnote continued from previous page.

patient care activities, thereby decreasing the quality and amount of health care available to people who rely on such programs.

The experience of McKeesport in dealing primarily with only three units, instead of the eight units set forth in the Final Rule, is compelling evidence that the proliferation of units in hospitals not only causes disruptions to patient care by work stoppages, multiple contract negotiations and whipsawing and leapfrogging, but also increases medical costs and threatens the financial stability of hospitals which encounter these tactics effectively utilized by unions.

This Court should grant certiorari to redress the Seventh's Circuit's sanctioning of the Board's erroneous "finding", especially where the Final Rule clearly creates the types of problems that concerned Congress when it extended the Act to non-profit hospitals.

CONCLUSION

For the foregoing reasons, St. Margaret Memorial Hospital and McKeesport Hospital, *amici curiae*, respectfully suggest that the Court grant the Petition for Writ of Certiorari and reverse the Court of Appeals' decision.

Respectfully submitted,

John E. Lyncheski*
Michael J. Reilly
E. Donald Ladov
Ronald J. Andrykovitch
Jeffrey A. Van Doren

COHEN & GRIGSBY, P.C.
2900 CNG Tower
625 Liberty Avenue
Pittsburgh, PA 15222
(412) 394-4900

Counsel for St. Margaret Memorial Hospital and McKeesport Hospital, Amici Curiae

**Counsel of Record*

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